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IN THE
COURT OF APPEALS OF INDIANA

JOE E. MARKLEY,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 85A05-0709-CR-501
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE WABASH CIRCUIT COURT
The Honorable Robert R. McCallen, III, Judge
Cause No. 85C01-0506-FC-74

April 18, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

SHARPNACK, Judge

Joe E. Markley appeals his sentence for operating while intoxicated causing death as a class C felony[1] and operating while intoxicated causing serious bodily injury as a class D felony.[2] Markley raises one issue, which we revise and restate as:

I. Whether the trial court abused its discretion in sentencing Markley; and

II. Whether the sentence is inappropriate in light of the nature of the offense and the character of the offender.

We affirm.[3]

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[1] Ind. Code § 9-30-5-5(a) (2004) (subsequently amended by Pub. L. No. 2-2005, § 36 (eff. April 25, 2005)).

[2] Ind. Code § 9-30-5-4(a) (2004).

[3] Markley included a copy of the presentence investigation report on white paper in his appendix. See Appellant's Appendix at 138-340. We remind Markley that Ind. Appellate Rule 9(J) requires that "[d]ocuments and information excluded from public access pursuant to Ind. Administrative Rule 9(G)(1) shall be filed in accordance with Trial Rule 5(G)." Ind. Administrative Rule 9(G)(1)(b)(viii) states that "[a]ll pre-sentence reports pursuant to Ind. Code § 35-38-1-13" are "excluded from public access" and "confidential." The inclusion of the presentence investigation report printed on white paper in his appellant's appendix is inconsistent with Trial Rule 5(G), which states, in pertinent part:

> Every document filed in a case shall separately identify information excluded from public access pursuant to Admin. R. 9(G)(1) as follows:
>
> (1) Whole documents that are excluded from public access pursuant to Administrative Rule 9(G)(1) shall be tendered on light green paper or have a light green coversheet attached to the document, marked "Not for Public Access" or "Confidential."
>
> (2) When only a portion of a document contains information excluded from public access pursuant to Administrative Rule 9(G)(1), said information shall be omitted [or redacted] from the filed document and set forth on a separate accompanying document on light green paper conspicuously marked "Not For Public Access" or "Confidential" and clearly designating [or identifying] the caption and number of the case and the document and location within the document to which the redacted material pertains.

The relevant facts follow. On the evening of April 15, 2005, Markley consumed marijuana and methamphetamine. On April 17, 2005, Markley was driving his vehicle with his nine-year-old son and fourteen-year-old nephew as passengers when he struck a vehicle driven by Oliver Lambert. Detta Black was a passenger in the vehicle driven by Lambert and was killed in the collision. Lambert was seriously injured, and both Markley's son and nephew sustained serious injuries in the collision. Metabolites of both marijuana and methamphetamine were found in Markley's blood.

The State charged Markley with: (1) Count I, operating a vehicle while intoxicated causing death as a class C felony; (2) Count II, operating a vehicle while intoxicated causing serious bodily injury to Lambert as a class D felony; (3) Count III, operating a vehicle while intoxicated causing serious bodily injury to Markley's son as a class D felony; and (4) Count IV, operating a vehicle while intoxicated causing serious bodily injury to Markley's nephew as a class D felony. Markley pleaded guilty to Count I and Count II. The plea agreement provided that the State would dismiss Count III and Count IV and that sentencing regarding Count I and Count II would be left to the trial court's discretion except that the sentences would be concurrent.

At the sentencing hearing, the trial court found two mitigating factors: (1) undue hardship on Markley's son; (2) and Markley's minimal criminal history. The trial court found three aggravators: (1) two minors were seriously injured in the collision; (2) Markley had two illegal substances in his body at the time of the collision; and (3) after being advised at the initial hearing to surrender his driver's license and not to drive, Markley obtained a duplicate driver's license and drove. On Count I, the trial court

sentenced Markley to six and one-half years in the Indiana Department of Correction with one year suspended to probation. On Count II, the trial court sentenced Markley to two years in the Indiana Department of Correction. The trial court ordered that the sentences be served concurrently.

I.

The first issue is whether the trial court abused its discretion in sentencing Markley. Markley's offenses were committed prior to the April 25, 2005, sentencing statute amendments. Thus, we apply the pre-April 25, 2005, sentencing statutes. See Gutermuth v. State, 868 N.E.2d 427, 432 n.4 (Ind. 2007).

Sentencing decisions rest within the discretion of the trial court and are reviewed on appeal only for an abuse of discretion. Smallwood v. State, 773 N.E.2d 259, 263 (Ind. 2002). An abuse of discretion occurs if "the decision is clearly against the logic and effect of the facts and circumstances." Pierce v. State, 705 N.E.2d 173, 175 (Ind. 1998). In order for a trial court to impose an enhanced sentence, it must: (1) identify the significant aggravating factors and mitigating factors; (2) relate the specific facts and reasons that the court found to those aggravators and mitigators; and (3) demonstrate that the court has balanced the aggravators with the mitigators. Veal v. State, 784 N.E.2d 490, 494 (Ind. 2003).

The trial court found two mitigating factors: (1) undue hardship on Markley's son; and (2) Markley's minimal criminal history. The trial court found three aggravators: (1) two minors were seriously injured in the collision; (2) Markley had two illegal substances in his body at the time of the collision; and (3) after being advised at the initial hearing to

surrender his driver's license and not to drive, Markley obtained a duplicate driver's license and drove. Markley argues that the first two aggravators were improper and requests that we reduce his sentence or remand for resentencing. We will address the aggravators separately.

A. Marijuana and Methamphetamine in Markley's Body.

The trial court used the fact that Markley had two illegal substances in his body, marijuana and methamphetamine, as an aggravating factor. Markley argues that this was improper because the fact that he had illegal substances in his body was an element of the offenses with which he was convicted. See Ind. Code § 9-30-5-5(a) ("A person who causes the death of another person when operating a motor vehicle . . . (2) with a controlled substance listed in schedule I or II of IC 35-48-2 or its metabolite in the person's blood . . . commits a Class C felony."); Ind. Code § 9-30-5-4(a) ("A person who causes serious bodily injury to another person when operating a motor vehicle . . . (2) with a controlled substance listed in schedule I or II of IC 35-48-2 or its metabolite in the person's body . . . commits a Class D felony.").

Although elements of a crime cannot be used to enhance a sentence, particularized circumstances of a criminal act may constitute separate aggravating circumstances. Morgan v. State, 675 N.E.2d 1067, 1073 (Ind. 1996). Here, an element of Markley's offenses was having "a controlled substance listed in schedule I or II of IC 35-48-2 or its metabolite in [his] body." I.C. §§ 9-30-5-4(a), 9-30-5-5(a). However, the trial court focused on the fact that Markley had not one but two controlled substances in his body. The fact that Markley had *two* controlled substances in his body was not an element of

his offenses. We conclude that the trial court did not abuse its discretion by using this aggravator. See, e.g., Brown v. State, 760 N.E.2d 243, 246 (Ind. Ct. App. 2002) (holding that a court may consider extreme youth as an aggravating factor even where the age of the victim is an element of the offense), trans. denied.

B. Injuries to Markley's Son and Nephew.

Markley argues that the trial court abused its discretion by using the fact that two minors, his son and nephew, were injured in the collision as an aggravating factor. Markley contends that the trial court could not use this aggravator because the charges against him related to operating a vehicle while intoxicated resulting in serious bodily injury to his son and nephew were dismissed as part of the plea agreement.

A plea agreement is a contract binding upon both parties when accepted by the trial court. Farmer v. State, 772 N.E.2d 1025, 1027 (Ind. Ct. App. 2002). This court will give effect to the parties' intent. Id. A trial court's reliance on facts that support charges dismissed as part of a plea agreement essentially circumvents the plea agreement and is therefore improper. Id.

The trial court used the fact that two minors, Markley's son and nephew, were seriously injured in the collision as an aggravating factor, but those injuries were elements of Count III and Count IV, which were dismissed as part of the plea agreement. See I.C. § 9-30-5-4(a) ("A person who causes *serious bodily injury* to another person when operating a motor vehicle . . . (2) with a controlled substance listed in schedule I or II of IC 35-48-2 or its metabolite in the person's body . . . commits a Class D felony."). Consequently, we conclude that the trial court abused its discretion by using this

aggravator. See, e.g., Farmer, 772 N.E.2d at 1027 (holding the trial court improperly enhanced defendant's sentence by resort to facts supporting charges dismissed pursuant to a plea agreement).

We will remand for resentencing if we cannot say with confidence that the trial court would have imposed the same sentence if it considered the proper aggravating and mitigating circumstances. McCann v. State, 749 N.E.2d 1116, 1121 (Ind. 2001). Here, the trial court considered one improper aggravator – the fact that minors were seriously injured in the collision. However, the trial court considered two other proper aggravators – the fact that Markley had two controlled substances in his body and the fact that he obtained a duplicate driver's license and drove after being advised by the trial court to surrender his driver's license and not to drive. Noting that it "really trouble[d]" him, the trial court appears to have assigned significant weight to the fact that Markley obtained the duplicate driver's license and drove. Transcript at 58. The trial court does not appear to have assigned significant weight to the improper aggravator.

The trial court also considered two mitigators – undue hardship on Markley's son and Markley's minimal criminal history. The trial court appears to have assigned little weight to Markley's criminal history as a mitigator because the trial court also noted that Markley had one 1988 conviction that involved "an automobile and consumption of a substance in violation of the law." Id. at 57. Given the remaining aggravators and mitigators, we can say with confidence that the trial court would have imposed the same sentence of six and one-half years with one year suspended to probation. See, e.g., Ray v. State, 838 N.E.2d 480, 494-495 (Ind. Ct. App. 2005) (holding that the trial court would

have imposed the same sentence regardless of the one improper aggravator where the trial court found two other proper aggravators and four mitigators), trans. denied.

II.

The next issue is whether Markley's sentence is inappropriate in light of the nature of the offense and the character of the offender. Ind. Appellate Rule 7(B) provides that we "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, [we find] that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Under this rule, the burden is on the defendant to persuade the appellate court that his or her sentence is inappropriate. Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006).

Our review of the nature of the offense reveals that Markley was driving his vehicle with his nine-year-old son and fourteen-year-old nephew as passengers when he struck a vehicle driven by Oliver Lambert. Detta Black was a passenger in the vehicle driven by Lambert and was killed in the collision. Lambert, Markley's son, and his nephew were also seriously injured. Metabolites of both marijuana and methamphetamine were found in Markley's blood.

Our review of the character of the offender reveals that Markley is the sole custodial parent of his son. However, less than two days before the collision, Markley and some friends "got loaded" at his house by ingesting marijuana and methamphetamine while his son was in bed. Transcript at 32, 35. Markley has a minimal criminal history – a 1988 conviction for operating while intoxicated as a class C misdemeanor – but his one conviction is similar to the instant conviction. Despite being ordered by the trial court at

the initial hearing to surrender his driver's license and not to drive, Markley proceeded to obtain a duplicate license at the BMV and to drive. Additionally, the trial court concluded that Markley's remorse expressed during the sentencing process was not sincere.

After due consideration of the trial court's decision, we cannot say that the sentence of six and one-half years with one year suspended to probation is inappropriate in light of the nature of the offense and the character of the offender. See, e.g., Gillem v. State, 829 N.E.2d 598, 607 (Ind. Ct. App. 2005) (holding that the defendant's enhanced sentences for causing death when operating a motor vehicle with a blood-alcohol content of .08 or higher were not inappropriate), trans. denied.

For the foregoing reasons, we affirm Markley's sentences for operating while intoxicated causing death as a class C felony and operating while intoxicated causing serious bodily injury as a class D felony.

Affirmed.

BARNES, J. and VAIDIK, J. concur